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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 92

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported as *Service Storage and Transfer Co., Inc.*, v. *Commonwealth of Virginia*, 199 Va. 797, 102 S.E. 2nd 339. The opinion of the State Corporation Commission of the Commonwealth of Virginia is set forth as *State Corporation Commission* v. *Service Storage and Transfer Co., Inc.*, in the record. (R. 74)

The opinion of the Interstate Commerce Commission which is in conflict with that of the Supreme Court of Appeals of Virginia is reported as *Service Storage*

and Transfer Co., Inc.—Petition for Declaratory Order, 71 M.C.C. 304.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on March 10, 1958. (R. 88) The petition for certiorari was filed on June 9, 1958, and was granted on October 13, 1958. (R. 98). The jurisdiction of this Court was invoked under Title 28, U.S.C., 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Constitutional Provisions, Article I, Section 8

* * *

"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;".

* * *

Federal Constitutional Provisions, Article VI

* * *

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

* * *

Federal Statutes

Interstate Commerce Act, Part II, Section 203(10); Title 49, U.S.C., Section 303(10).

"The term 'interstate commerce' means commerce between any place in a state and any place in another state or between places in the same state through another state, whether such com-

merce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

Interstate Commerce Act, Part II, Section 204(c); Title 49, U.S.C., Section 304(c);

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Virginia Statutes

Title 56, Code of Virginia, Section 278; *Vol. 8,* page 235:

"No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the state without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

Title 56, Code of Virginia, Section 304.12; *Vol. 8,* Cum. Supp.:

> "The Commission may, by judgment entered after a hearing on notice duly served on the defendant not less than ten (10) days before the date of the hearing, if it be proved that the defendant made any misrepresentation of a material fact to obtain a warrant, exemption card or registration card, has made any improper use of any warrant, exemption card, registration card, classification plate, identification marker or identifying number, has violated any law of this state regulating the operation of motor vehicles for compensation on the highways of this state, has failed to make any report required by the Commission, has failed to pay any fee or tax properly assessed against him or has failed to comply with any lawful order, rule or regulation of the Commission, impose a penalty not exceeding One Thousand Dollars ($1,000.00), which shall be collectible by the process of the Commission as provided by law."

THE QUESTIONS PRESENTED

(1) Whether a state agency lawfully may impose criminal sanctions on a motor common carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission.

(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of the Interstate Commerce Act and in contravention of the "Commerce clause" of Article I, Section 8 of the Federal Constitution.

(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek such relief from the Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act.

STATEMENT OF THE CASE

(a) The Specific Violations Alleged

The Commission's Rule (R. 2) sets forth a total of seventeen shipments which are alleged to have been intrastate in character and, therefore, in violation of the provisions of Chapter 12, Title 56 of the Code of Virginia. The origins and destinations of the specific shipments involved may be shown in summary form as follows:

Origin	Destination	No. of Shipments
Roanoke, Va.	Coeburn, Va.	4 shipments
Roanoke, Va.	Big Stone Gap, Va.	3 shipments
Roanoke, Va.	Oakland, Va.	1 shipment
Roanoke, Va.	Norton, Va.	1 shipment
Lynchburg, Va.	Coeburn, Va.	1 shipment
Bluefield, Va.	Haysi, Va.	1 shipment
Roanoke, Va.	Glen Lyn, Va.	1 shipment
Lynchburg, Va.	Draper, Va.	1 shipment
Roanoke, Va.	Wytheville, Va.	1 shipment
Bristol, Va.	Carbo, Va.	1 shipment
Bristol, Va.	Cranes Nest, Va.	1 shipment
Bristol, Va.	Wise, Va.	1 shipment

Petitioner admitted that the shipments in question were actually transported by it, but denied that such shipments were moved in intrastate commerce. As a matter of defense, it was asserted that all of the questioned shipments in moving from origin to destination were transported through Bluefield, W. Va., as

required by the certificate of public convenience and necessity which it holds from the Interstate Commerce Commission (R. 31-33—Exhibit No. 2). The fact that all operations involving the transportation of shipments from Virginia origins to Virginia destinations were conducted through the Bluefield, W. Va., gateway was affirmatively established (R. 34, 35, 39, 46) and stipulated as fact (R. 22).

(b) Petitioner's Interstate Commerce Certificate and the Operations Performed Thereunder

Exhibit No. 2 (R. 100) reveals that petitioner is authorized under its Interstate certificate to transport property (general commodities) as a motor common carrier in interstate commerce:

> (1) Between Bluefield, Va., and points and places within 5 miles of Bluefield, Va., and those within 5 miles of Bluefield, W. Va., respectively, on the one hand, and, on the other points and places in that part of Virginia and West Virginia within 75 miles of that territory. (Second paragraph under General Commodity Description)

The carrier is also authorized to conduct operations:

> Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, to that part of Virginia west of U. S. Hwy 29 and south of U. S. Hwy 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Hwy 60 which is within 80 miles of Bluefield, W. Va. (Third paragraph under General Commodity Description)

Under petitioner's construction of its certificate and that of the Interstate Commerce Commission, the carrier conducts operations between points in Virginia,

on the one hand, and points in West Virginia, on the other hand, within the limits of the authorities set forth above. The carrier also accepts for transportation shipments moving from one Virginia point within the described territory to a second Virginia point within the described territory. This is done by using the two separate grants set forth above in combination (R. 34-35). It is as though two independent carriers were interchanging freight, one with the other at Bluefield, W. Va. (R. 35). To exemplify, upon receiving a request to transport a shipment from Lynchburg, Va., to Draper, Va., the carrier would pick up the shipment at Lynchburg under the authority contained in the first paragraph set forth above and transport it to its terminal at Bluefield, W. Va. Upon arrival at that point, the shipment would be transported to the Virginia destination under the authority contained in the second paragraph set forth above (R. 34-35).

On traffic handled between Virginia origin and destinations properly published and lawful interstate rates are applied (R. 44-45), and the Virginia shipping public is advised that tariff charges of petitioner are "applicable only on interstate traffic" (R. 45). Petitioner's tariff charges for interstate movements of freight between Virginia points sometimes result in costs higher than those assessed by intrastate carriers (R. 45). Petitioner's solicitation for traffic moving from one Virginia point to a second Virginia point is confined to traffic moving interstate. (R. 44-45) The shippers using petitioner's service from Virginia origins to Virginia destinations are aware that the traffic moves on interstate tariffs and that the traffic is physically moved through Bluefield, W. Va. (R.

66-71). Only a minor portion of petitioner's interstate transportation involves a movement of traffic from Virginia origins to Virginia destinations. (R. 106-107). During the past three years petitioner has derived approximately 3 per cent of its total interstate revenues from the transportation of traffic moving from one Virginia point to another Virginia point (R. 43). The minor amount of traffic that is moved between Virginia points consists in the main of small shipments (R. 28-29-37). The small shipments moving between Virginia points are consolidated with other interstate shipments moving between points in Virginia, on the one hand, and points in other states, on the other (R. 37-38). To illustrate, a consolidated truckload of small shipments is originated in Virginia. The vehicle is then dispatched to Bluefield, W. Va., where all shipments are handled through petitioner's terminal facilities at that point. At Bluefield, W. Va., shipments destined to Virginia receivers are consolidated in a vehicle with other Virginia traffic coming into the Bluefield, W. Va., terminal from non-Virginia origins (R. 34-38). The route of movement followed by some shipments handled by the carrier is necessarily longer than the shortest highway route available between the origin and destination points of the shipments involved. This is true of traffic handled by the carrier between Virginia, on the one hand, and West Virginia, on the other, as well as betwen Virginia points (R. 40-42, 106-106). However, the fact that a given small shipment must traverse a circuitous routing does not render the operation non-feasible, impracticable or unprofitable (R. 42).

(c) The Interpretation of Petitioner's Certificate by the Interstate Commerce Commission

Long prior to the institution of criminal proceedings against petitioner by the Virginia authorities the Interstate Commerce Commission set forth its interpretation of the certificate of public convenience and necessity held by petitioner. In approving acquisition of control of petitioner by Smith's Transfer Corporation in MC-F-5361, *Smith's Transfer Corporation of Staunton, Va.—Control—Service Storage and Transfer Company, Inc.*, 59 M.C.C. 803 (report not printed in full in the Commission's Motor Carrier Reports), the Interstate Commerce Commission found that the federal certificate of petitioner authorized operations of the type later questioned by the Virginia Commission. In the unpublished report of the federal Commission in that proceeding it was found as follows:

> "Under its existing authority, Service Storage may lawfully perform a cross-haul service under a combination of its radial rights by operating for example: between points in West Virginia within 75 miles of the base area on the one hand and on the other points in Virginia on and west of U. S. Hwy 29 and on the south of U. S. Hwy 60 and points in the three Kentucky counties provided such operations under a combination of the various rights are routed through Bluefield as a gateway".

In the same report of the Commission it was found:

> "While Smith's Transfer interlines with Service Storage exclusively at Bluefield, which it proposes to continue, they nevertheless have available for interline a number of other legally authorized points, for example, Lynchburg, Lexing-

ton and Covington, from which Service Storage could transport the shipments to points in the three Kentucky counties and to points in Virginia and West Virginia within 75 miles of Bluefield provided such shipments are in turn routed by it through Bluefield."

During the pendency of the enforcement proceedings before the Virginia State Corporation Commission petitioner filed with the Interstate Commerce Commission its request for an order declaring the scope of operations authorized under its federal certificate. In *Service Storage and Transfer Co., Inc.—Petition for Declaratory Order*, 71 M.C.C. 304, the federal Commission reaffirmed its earlier findings and held that the operations of petitioner which had been brought into question by the Virginia Commission were in fact *bona fide* and authorized by petitioner's interstate certificate.

(d) The Decisions of the Interstate Commerce Commission With Respect to Its Interpretation of Petitioner's Federal Certificate Are Supported by Reason and Precedent

In *Transport Corporation of Virginia—Extension—Maryland*, 43 M.C.C. 716, the federal Commission reaffirmed the consistently followed principle that separate grants of interstate operating authority (either regular route or irregular route) may be used in combination so as to permit through operation between points on the separately described routes or areas. There the Commission stated: (Page 719)

"It is well settled that regular-route motor common carriers may operate over all combinations of their separately described routes and between all authorized points thereon, unless their service is specifically restricted in some particular. *Powell*

Bros. Truck Lines, Inc.—Purchase—Bryan, supra. The same principle has been applied to regular-route common-carrier operations acquired by purchase, merger, or in proceedings under section 207(a) of the act. *Days Tranfer, Inc.—Purchase—Haner,* 39 M.C.C. 339; *Dixie Freight Lines, Inc., Common Carrier Application,* 24 M.C.C. 780. And, it has been held generally in motor-carrier proceedings under sections 5 and 212(b) of the act that where common-carrier regular-route and irregular-route authorities, or two or more common-carrier irregular-route authorities are unified for operation by one carrier, through service may be provided between authorized points in both of such authorities, unless the public interest requires the imposition of a restrictive condition against the rendition of through service in whole or in part. The only requirement in these instances has been that there must be a point of service common to both operating authorities and the physical operation must be rendered through such common point. *Carolina Freight Carriers Corp.—Purchase—Edmunds,* 36 M.C.C. 259, *B & E. Transp. Co., Inc.—Purchase—Merchants Transp., Inc.* 36 M.C.C. 561; and *Consolidated Freightways, Inc.—Purchase—Pacific I. Exp.,* 38 M.C.C. 577.)"

The conclusions reached by the Interstate Commerce Commission in *Transport Corporation of Virginia* have been followed in *Aetna Freight Lines, Inc., Interpretation of Certificate,* 48 M.C.C. 610. They have also been followed by the Federal courts. See, *Century-Matthews Motor Freight* v. *Thrun,* 173 F. 2d 454 and *Interstate Common Carrier Council* v. *U.S.,* 84 F. Supp. 414, 420.

(c) The Action of the State Corporation Commission and the Supreme Court of Appeals of Virginia

The State Corporation Commission in its judgment entered February 26, 1957 (R. 72) ordered the imposition of a fine of $500.00 for each of seven of the 17 shipments alleged as violations in the Commission's Rule to Show Cause. Additionally it assessed fines of $500.00 on each of three shipments which were not alleged as violations in the Commission's Rule to Show Cause. The State Corporation Commission did not impose fines on the 10 remaining violations alleged in its Rule. Accordingly it may be inferred that the shipments transported by petitioner from Roanoke, Virginia, to Coeburn, Virginia, Big Stone Gap, Virginia, Oakland, Virginia, and Norton, Virginia, and from Lynchburg, Virginia, to Coeburn, Virginia, although transported through Bluefield, West Virginia, even in the judgment of the Virginia authorities constitute interstate commerce.

The State Corporation Commission's conclusion that certain of the alleged violations were intra-state in character rests on a single undisputed fact finding, i.e., that the physical route of movement traversed by the individual shipments in question did not follow "the normal, regular or usual route" (R. 82). In finding that several of petitioner's vehicles did not follow the shortest highway route as determined from the state highway map of Virginia and concluding that such operations were not bona fide interstate commerce and therefore intra-state commerce, the State Corporation Commission relies almost exclusively on this Court's decision in *Eichholz* v. *Public Service Commission of Missouri,* 306 U.S. 268.

On review of the State Corporation Commission's action, the Supreme Court of Appeals of Virginia adopted the views of the Commission and in so doing again placed primary reliance on *Eichholz*. It is to be noted that although the Interstate Commerce Commission's decision in *Service Storage and Transfer Co., Inc., Petition for Declaratory Order,* supra, was brought to the attention of the Virginia Court, that Court omits discussion of the Interstate Commerce Commission's conclusions and, in fact, makes no reference whatever to the action of the federal Commission.

ARGUMENT

THE OPERATIONS INVOLVED ARE INTERSTATE IN CHARACTER UNDER COMPLETE FEDERAL REGULATION, AND MAY NOT BE REGULATED BY STATE AGENCIES THROUGH THE IMPOSITION OF CRIMINAL PENALTIES OR OTHERWISE

(a) The Operations Are Interstate by Definition

The Federal Congress in enacting the Motor Carrier Act of 1935 intended to and did design a complete scheme of regulation for interstate transportation by motor carrier. The definition of interstate commerce as contained in the Act is "commerce between any place in a state and any place in another state or between places in the same state through another state". The evidence in the instant proceeding demonstrates quite clearly that the questioned operations of petitioner since they were all performed through Bluefield, West Virginia, come within the term "interstate commerce" as defined by the Congress in the Motor Carrier Act.

It has been shown that the questioned operations constitute a minor portion of the business of petitioner but that nonetheless the operations are conducted in conjunction with the transportation of traffic

between Virginia and other states. Petitioner's method of handling freight between points in Virginia is identical to that employed in the performance of service between Virginia and other states including West Virginia. In many cases the freight moving from Virginia origins to Virginia destinations is transported in a vehicle which at the same time (for at least a portion of the movement) is handling traffic moving to other states.

(b) The Operations Have Been Declared to be Interstate by the Interstate Commerce Commission

As hereinbefore pointed out, the Interstate Commerce Commission on two separate occasions has found under its own construction of its own order, i.e., petitioner's certificate, that the operations alleged to be intra-state by the Virginia authorities are in fact interstate in character and subject to the regulation of the Interstate Commerce Commission.

In the *Declaratory Order* proceeding the Interstate Commission cites *Atlantic Freight Lines, Inc., Petition for Declaratory Order,* 51 M.C.C. 175, in support of its ultimate conclusions. That case which presented factual and legal issues in all essential respects identical to those presented here, in petitioner's view, warrants careful consideration by this Court because of the Commission's thorough development of the subject matter and its well reasoned conclusions.

As disclosed by the report of the Commission in the *Atlantic Freight Lines case,* supra, the carrier there, prior to requesting the Interstate Commerce Commission to define the limits and scope of its operating authority, had been ordered by the Pennsylvania Public Utility Commission to cease and desist from the ren-

dition of service between points in Pennsylvania over its interstate route through Baltimore, Md. The order of the Pennsylvania Commission was sustained by the Superior Court of Pennsylvania, *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utilities Commission,* 60 A (2d) 589. The Supreme Court of Pennsylvania and this Court refused to review the case. Thereafter, the Interstate Commerce Commission entertained the carrier's Petition for a Declaratory Order in spite of the carrier's failure to obtain further judicial review because it found:

> "* * * that primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission." 51 M.C.C. 175, 186.

As authority for that proposition the Interstate Commerce Commission referred to the opinion of the Superior Court of Pennsylvania in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utilities Commission,* supra, wherein it was held:

> "That the question of what is interstate commerce is one of fact; that since enactment of the Motor Carrier Act of 1935, the conclusive determination of that fact is vested in this [federal] Commission; that when this Commission has determined that certain transportation is bona fide interstate transportation, no state commission or court may thereafter collaterally attack such finding in another proceeding; but, where this Commission has not determined the question, the State Commission or court must use its best judgment in initially doing so." 51 M.C.C. 178.

Although the Pennsylvania Public Utilities Commission was charged with substantially the same responsibility in connection with the *Atlantic* matter

that the Virginia Commission has in connection with the instant proceeding and, although the Pennsylvania Commission attempted to support its position with the identical arguments and authorities that the Virginia Commission relies upon, the carrier involved in the Pennsylvania case was finally permitted to conduct operations between points in Pennsylvania in accordance with the interpretation placed upon its certificate by the Interstate Commerce Commission.

Instead of accepting the Interstate Commerce Commission's decision in *Atlantic* the Virginia authorities have amended federal legislation and redefined "interstate commerce" as follows:

> "commerce between places in the same state through another state when such commerce moves over a 'normal, regular or usual route' between the points involved."

In support of its attempt to modify the definition contained in the Interstate Commerce Act, the State Corporation Commission and the Virginia Supreme Court of Appeals look to this Court's opinion in *Eichholz* v. *Public Service Commission of Missouri*, 306 U.S. 268.

In the case relied upon by the Commonwealth of Virginia, Eichholz, the defendant, prior to 1935 had obtained a permit from the Missouri Public Service Commission to conduct operations as a motor carrier of property in interstate commerce. Since the Federal Government in the period prior to 1935 had not subjected interstate motor carrier operations to regulation, it was, of course, proper that such operations be regulated, within limits, by state agencies. After the passage of the Federal Motor Carrier Act in 1935,

Eichholz applied to the Interstate Commerce Commission for a "grandfather permit" under the provisions of Section 209(a)(1) of Part II of the Interstate Commerce Act. While that application was pending, the Missouri Commission had determined that certain of Eichholz' operations were, in fact, intrastate in character. Notwithstanding the fact that the questioned operations between Missouri points had been conducted across the state line of Missouri, it was held by the Missouri authorities that the operations of the defendant constituted a subterfuge and were conducted across the state line solely for the purpose of escaping Missouri regulation. Accordingly, the defendant's Missouri interstate permit was withdrawn by the state authorities. On review the action of the state agency was sustained by this Court. The reason underlying this Court's approval of the Missouri Commission's assumption of jurisdiction is, in our view, expressed with crystal clarity in Chief Justice Hughes' second finding, 306 U.S. 268, 273:

> "When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded."

The above-quoted language takes on added significance when read in the light of *H. P. Welch Co.* v. *New Hampshire,* 306 U.S. 79. In that case the carrier challenged the validity of a New Hampshire statute which prescribed twelve hours as the maximum on-duty time for drivers of motor vehicles engaged in specified

transportation. Inter alia, the carrier contended that its interstate operation could not be made subject to the New Hampshire statute because the Interstate Commerce Commission had been empowered through the enactment of the Federal Motor Carrier Act to "establish reasonable requirements with respect to qualifications and maximum hours of service of employees and safety of operation and equipment." This Court approved the action of the state agency holding that the petitioner had violated the provision of the New Hampshire Act involved and observed: (306 U. S. 79, 84):

> "The violations for which the State Commission suspended appellant's registration certificates occurred after the effective date of the Federal Act and before the Interstate Commerce Commission made its order."

Continuing, the court stated:

> "Without so deciding, we assume, so far as concerns the periods of continuous service condemned by the State Commission, that when the Federal Regulations take effect they will operate to supersede the challenged provisions of the state statute."

The opinions of the Supreme Court in both *Eichholz* and *Welch* reflect the application of the principle that until the Federal Government has acted the state governments have authority within limits, to regulate interstate commerce. Equally clear in the opinions, however, is the principle that when the Federal Government has "occupied the field" the state governments are precluded from exercising jurisdiction.

In the case at bar, it is clear beyond question that the "field" in which the State Corporation Commission

has sought to assume jurisdiction and exercise control has been completely "occupied" by the Federal Government. Since the Federal Government has acted, the State of Virginia has been divested of all power to exercise control in this area. The foregoing conclusion is supported by convincing authority contained in *Bethlehem Steel Co.* v. *New York Labor Relations Board,* 330 U.S. 767. There the Court stated, page 773:

> "In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised (Citing H. P. Welch Co. v. New Hampshire, supra) but when Federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has been taken up by the Federal Agency."

If there ever existed any doubt as to whether a state could determine what carriers could or could not operate in interstate commerce after the enactment of the Federal Motor Carrier Act, such doubt was removed by this Court's decision in *Castle* v. *Hayes Freight Lines,* 348 U.S. 61. In that case Hayes Freight Lines, a motor carrier authorized to conduct interstate operations by the Interstate Commerce Commission, brought under attack an Illinois statute which authorized the state to punish a carrier who had violated the state's size and weight law repeatedly by suspending the carrier's right to use the highways of the State of Illinois. The Illinois State Supreme Court held that punishment or suspension provided by the state statute

could not be imposed on the interstate operations of the respondent Hayes. On review by this Court it was held that Illinois suspension of interstate transportation was in conflict with the Federal Motor Carrier Act which is the supreme law of the land. At page 63 this Court stated:

> "Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by Section 306 of 49 USC which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity. And Section 312 of the same title provides that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided.' But in order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate. No certificate is to be revoked, suspended or changed until after a hearing and a finding that a carrier has wilfully failed to comply with the provisions of the Motor Carrier Act or with regulations properly promulgated under it. Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. It cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate."

In *Roundtree* v. *Terrell*, 22 F. Supp. 297, the U. S. District Court for the Northern District of Texas held in factual circumstances not unlike those presented here, that the Texas Railroad Commission could not unlawfully restrain movement of freight by an authorized interstate carrier from Fort Worth to Texarkana, Texas, through a state-border terminal located in Arkansas. The Court's holding was reached simply by application of the definition of "interstate commerce" as set forth in the Federal Motor Carrier Act. At page 299 the Court stated:

> "The freight passed from Texas into Arkansas. When it does that, it is interstate commerce. The Federal Motor Carrier Act, 49 U.S.C.A. Section 303(a)(10), defines interstate commerce as that commerce which passes from state to state, or which passes from a place in one state to another place in the same state, through another state. It is commerce that is not entirely within the limits of a single state. That the carrier has seen fit to establish his terminus in Texarkana, Ark., instead of Texarkana, Tex., may not be criticized as an illegal subterfuge, if it is an actual fact. There is nothing wrong, nothing illegal, about putting a depot in Arkansas instead of in Texas. If by so doing the carrier escapes Texas taxes or Texas supervision, he is merely exercising business acumen. He pays for the service which he renders his customers. If he carries freight from Dallas to his depot in Arkansas, then unloads it, under a good-faith plan, and subsequently, when daylight comes, delivers it to his customers in Texarkana, Tex., he is doing what he has a right to do. The termini are in Texas and Arkansas. That sort of transportation is amenable solely to the national government. Any attempt to hamper it must be viewed as illegal, unconstitutional, and void."

The Virginia Commission having accepted and applied *Eichholz* sought to rationalize that acceptance by reference to *Dohrn Transfer Co.* v. *Hoegh,* 116 F. Supp. 177 (R. 77). That case, carefully read, rather than lending support to the decision of the Commission strengthens the position of petitioner. A three-judge Federal District Court refused to decide the constitutionality of an Iowa statute which prohibited the transportation of freight by for-hire motor carriers in the absence of a state certificate between points in Iowa. Prohibited operations included "the crossing of any state line of the state of Iowa." The carrier plaintiff had crossed state lines under an Interstate certificate in the movement of traffic from one Iowa point to another. The Court refused to hold the statute in question unconstitutional because such action was not required to dispose of the issues involved. The significant point of the case is that the Court did enjoin the Iowa Commissioners from enforcing the statute against the plaintiff in an unconstitutional manner, stating, 116 F. Supp. 190:

> "It is not deemed necessary in the present case to make a declaration as to the constitutionality of Section 325.6 as amended. The plaintiff will be afforded adequate relief by treating the provisions of that Section as not applicable to the plaintiff and enjoining the members of the Iowa Commerce Commission accordingly."

(c) The Questions of Motive, Good Faith or Intention Are Not Material to the Ultimate Issue, But on the Assumption That They Are the Commission Has Failed to Prove That Petitioner's Questioned Operations Were Conducted in Bad Faith

In *Western Union Telegraph Company* v. *Speight,* 254 U.S. 17, it was held by the Supreme Court of the United States that the transmission of a tele-

gram from a point to another point in the same state through a point in a second state is interstate commerce. It was there stated by Justice Holmes at pages 18-19: "That the transmission of a message through two states is interstate commerce as a matter of fact" and that "The fact must be tested by the actual transaction" and "Moreover, the motive would not have made the business intrastate." On the authority of that case petitioner contends that the issue of good faith or motive is not involved. See also *Roundtree* v. *Terrell,* supra. Additionally, petitioner contends that the bona fides of its operation has been found by the Interstate Commerce Commission, and the issue is foreclosed. However, even accepting the rule of decision applied by the State Commission, petitioner contends that the record compels the conclusion that such standards have been met. It should be remembered that, since the case below was a criminal proceeding involving as it did several penalties, the burden of proof rested with the Commission. Under the Commission-adopted formula, the Commission was required to establish by probative evidence that the carrier's operations were not in "interstate commerce" by demonstrating that the shipments involved were not transported in "good faith" through a point in West Virginia. This the Commission failed to do. Petitioner, however, did not rest on its jurisdictional or legal defense; it submitted affirmative evidence which required that the Commission find:

(1) That all of the questioned shipments were transported by petitioner through Bluefield, West Virginia.

(2) That all of the questioned shipments were transported subject to rates published in petitioner's interstate tariffs.

(3) That petitioner's rates for the traffic involved were sometimes higher than prevailing rates of intrastate carriers.

(4) That petitioner's solicitation of the Virginia shipping public is confined to interstate traffic.

(5) That those members of the Virginia shipping public that have used the service of petitioner are aware that traffic handled is transported through Bluefield, West Virginia.

(6) That petitioner has derived an insignificant portion of its total revenues from the transportation of traffic between Virginia points (approximately 3 per cent).

(7) That petitioner's transportation of traffic between Virginia points consists in the main of less-truckload shipments.

(8) That petitioner's transportation of shipments between Virginia points is consolidated with other interstate traffic moving between points in Virginia and points in other states.

(9) That the profitability and practicality of petitioner's operations as a whole does not relate to the route of movement taken by an individual shipment because of the nature of the traffic handled by petitioner and because petitioner's operation is essentially one of distribution.

(10) That the circuity of mileage traversed by certain Virginia shipments is in many cases no greater than the circuity of mileage traversed by shipments moving from Virginia to West Virginia.

The Commission ignored the evidence supporting the foregoing findings and refused to make findings on these elements because it had already arbitrarily adopted the "normal, regular or usual route" principle which obviously has no application to an irregular route distribution carrier of small shipments. If the Commission had made a careful analysis of *Eichholz*, it would have found that the carrier in that case, contrary to petitioner, conducted industrious solicitation, that it transported traffic at lower rates than intrastate carriers, gave no terminal handling to the traffic, specialized in truckload or volume traffic, and did not possess an interstate certificate at the time.

Petitioner has demonstrated that *Eichholz* has no application in the present circumstances because the Interstate Commerce Commission has acted and ousted the state of jurisdiction. However, assuming, *arguendo*, that the *Eichholz* doctrine validly could be applied, its proper application to the record facts in the instant proceeding require the conclusion that petitioner's operations did not constitute a subterfuge to defeat or evade state regulation. Proof of the foregoing proposition is established by contrasting the elements of petitioner's operations with those of Eichholz.

The inherent weakness of the Commission's finding of bad faith compelled an attempt to support its conclusions with a practical argument. The Commission in its opinion (R. 82) asserts that if petitioner is right in its interpretation of its certificate:

> "The permit not only permits it to haul by circuitous routes between Virginia cities it necessarily follows that its certificates compel it to perform those circuitous movements."

For purposes of this case it can be agreed that a common carrier is required to perform the operations authorized in its certificate. As a matter of fact, Exhibit No. 2, in the 3rd Ordering Paragraph contains the following language:

> "It is further ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate."

It was because of the language immediately above quoted that petitioner throughout this proceeding has resisted the interference of the state authorities. Petitioner quite reasonably interpreted the quoted language to mean that the Interstate Commerce Commission in issuing the certificate required it to perform all of the services authorized. In any event whatever questions may have existed relative to petitioner's certificate, the Declaratory Order of the Federal Commission, makes it abundantly clear that petitioner is required to perform service consistent with the Federal Commission's interpretation of the certificate. The State Corporation Commission's opinion on this point has no merit for there is no evidence of record to prove or even to suggest that the petitioner has in any way limited its service short of the scope authorized by the Interstate Commerce Commission. The record as a whole quite convincingly establishes that the carrier has accepted and transported all traffic offered to it by the shipping public. The extreme examples resorted to in the opinion of the Commission are of no significance, particularly since the hypothetical examples presented have no record support.

THE LEGALITY OF AN INTERSTATE MOTOR CARRIER'S OPERATIONS PERFORMED PURSUANT TO A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE INTERSTATE COMMERCE COMMISSION MAY ONLY BE CHALLENGED IN A FEDERAL FORUM

Petitioner and the Commonwealth of Virginia agree that transportation of freight from a Virginia origin to a Virginia destination can be either intra-state or interstate commerce depending on the circumstances and the conditions attending the movement. It is petitioner's position that traffic transported between Virginia points through a sister state in accordance with a certificate issued by the Interstate Commerce Commission is *interstate* in character and not subject to state control or regulation. On the other hand, the Commonwealth of Virginia contends that it is not bound by the terms of a motor carrier's interstate certificate as interpreted by the issuing agency, the Interstate Commerce Commission, but holds that traffic transported between Virginia points is interstate *only* when such traffic moves through a sister state over the "normal, regular or usual route."

The conflicting contentions above stated necessarily raise a fundamental jurisdictional question—i.e. whether state or federal forums are empowered to decide with finality whether given activities are interstate or intrastate. Statement of the question appears to make its resolution obvious—particularly where, as here, the federal legislature has created a comprehensive scheme of regulating interstate motor transportation and has promulgated a definition of "interstate commerce" intended for application by the Interstate Commerce Commission in issuing and construing operating authorities of the type held by peti-

tioner. Even the federal judiciary, including this Court, has exercised an extreme reluctance to disturb the Interstate Commerce Commission's conclusions interpreting its own orders. *Andrew G. Nelson, Inc.* v. *Jessup,* 134 F. Supp. 221; *Noble* v. *U.S.,* 319 U.S. 88. To permit State Agencies to determine with finality what constitutes "interstate commerce" as that term is used in the Interstate Commerce Act and to assess the scope of operations authorized by a federal agency would be to empower state governments to frustrate the purpose and intent of both the "supremacy clause" and "commerce clause" of the Constitution. One can easily anticipate the evils that would attend application of the Virginia definition of "interstate commerce" by 49 different state agencies. Would not differing state authorities make varying application of the vague, indefinite standard sponsored by the Commonwealth of Virginia? And would not the rule of constitutional construction established in *Martin* v. *Hunter's Lessee,* 1 Wheaton 304 be negated?

Petitioner does not contend that a state may not ever question the legality of the operations performed by a federally authorized motor carrier. It simply asserts that where, as in the instant controversy, the motor carrier is conducting operations in compliance with a federal order, the state must seek any relief to which it believes itself entitled from the Interstate Commerce Commission initially or on review in the Federal Courts.

Assuming, without conceding, that the State Corporation Commission, or any of the intrastate carriers which the Commission alleges that it is protecting, are actually aggrieved by any of the operations conducted

by petitioner, the appropriate forum to entertain the request for relief was the Interstate Commerce Commission. State commissions as well as other interested parties under the provisions of Section 204(c) and other sections of Part II of the Interstate Commerce Act may resort to the Interstate Commerce Commission for relief in instances where authorized carriers are alleged to be operating beyond the scope of their certificates. Additionally, the Administrative Procedure Act permits the Interstate Commerce Commission to issue declaratory orders interpreting certificates of public convenience and necessity issued by that Commission. In this connection it is significant to note that, although petitioner served a copy of its petition for declaratory order to the Interstate Commerce Commission on the State Corporation Commission the state agency chose not to submit to the jurisdiction of the Interstate Commerce Commission. That the Interstate Commerce Commission is the proper forum for determination of the issues presented here is made quite apparent in the *Castle Case,* supra, where this Court observed, 348 U.S. 61, 65:

> "If therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the state's interest either on the Commission's own initiative or on complaint of the state."

Even more closely in point to the case at bar is *Andrew G. Nelson, Inc.* v. *Jessup, supra.* There, as here, the scope of operation permitted by the carrier's interstate certificate was questioned by state authorities. The Federal District Court enjoined state officials from interfering with the operations of the carrier until such time as the Interstate Commerce

Commission had made a determination of the operating rights of the carrier. As in the *Castle Case,* supra, the state authorities were advised that the proper forum to question the operations of the carrier was the Interstate Commerce Commission. The language of the Court merits direct quotation, page 229:

> "As indicated by the Supreme Court in the Castle case, if a state has a grievance against an interstate carrier its remedy lies under Section 204(c) of the Act * * * which provides for the filing of complaints 'to the Commission by any person, state, Board, organization or body politic.' And for the investigation and disposition of such complaints."

The Court also stated, page 228 that:

> "The construction of an interstate carrier's permit by state officials is untenable."

The Federal Court cases last cited express the principle employed by the Interstate Commerce Commission in the *Atlantic Freight Lines Case,* supra, when it interpreted its own order even after the meaning of the order had been the subject of extended litigation before the State Courts.

On the authority of the cases cited, it must be concluded that the Corporation Commission, if entitled to any relief, was required to seek a remedy from the Interstate Commerce Commission.

CONCLUSION

Petitioner prays that this Court (1) reverse the action of the Supreme Court of Appeals of Virginia and issue a mandate directing that Court to instruct the Virginia State Corporation Commission to vacate the

latter's order requiring petitioner to pay fines in the amount of $3,500.00 and (2) grant such further relief as is just in the circumstances.

Respectfully submitted,

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Dated: January 5, 1959